STATE OF MICHIGAN

COURT OF APPEALS

SIMON THWAITE,

Plaintiff-Appellant,

v

VINCENTI COURT, LLC,

Defendant-Appellee,

and

BLOOM ROOFING SYSTEMS, INC,

Defendant,

and

LINDHOUT ASSOCIATES ARCHITECTS,

Defendant/Third-Party Plaintiff,

and

CONTRACTING RESOURCES,

Third-Party Defendant.

UNPUBLISHED
October 22, 2009

No. 287983
Oakland Circuit Court
LC No. 2006-079025-NO

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant Vincenti Court, LLC's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In this premises liability case, plaintiff fell when he parked his car in a handicap spot in the parking lot owned by Vincenti Court (plaintiff had broken his leg in a skiing accident), got out, and began to cross the lot. Plaintiff was going to work; his employer leased space in Vincenti Court's building. Vincenti Court's motion for summary disposition argued that the

condition was open and obvious and did not present an unreasonable risk of harm. Vincenti Court also argued that it did not possess the premises because plaintiff's employer, by the express terms of its lease with Vincenti Court, had sole use of the parking lot and responsibility for snow and ice removal in the parking lot. Plaintiff countered that the condition was not open and obvious because there was no snow on the pavement and plaintiff could not see any ice there, even after he got out of the car. Moreover, even if the condition was open and obvious, it presented an unreasonable risk of harm because parking in the handicap spot was unavoidable (parking farther away would have required him to cross more hazardous areas of the parking lot) and because ice in a handicap parking spot is inherently dangerous. Finally, Vincenti Court could not delegate to plaintiff's employer its duty to maintain the premises in a safe condition. A pipe draining water from the roof of the building was the cause of the unnatural accumulation of water that turned the parking lot icy in cold weather. Plaintiff asserted that his employer had no authority to remedy this problem.

The trial court agreed with all of Vincenti Court's arguments. It reasoned that ice and snow are not open and obvious per se, under the present case law, but one considers whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. Plaintiff had stated that he could see the spot where he parked appeared wet, and the court concluded that it was reasonable to expect a person of ordinary intelligence to anticipate that wet pavement may be icy in the winter when snow and ice were visibly present nearby. Even if the ice was unavoidable, the court found the parking lot presented no uniquely high likelihood of harm or severity of harm. The court concluded that plaintiff had seen the ice but had failed to recognize what it was until he slipped on it. Finally, the court found that Vincenti Court lacked the possession and control of the premises necessary to be held liable because the lease specifically provided that plaintiff's employer was responsible for removing ice and snow from the parking lots and sidewalks.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

A premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises unless the dangers are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). To succeed in an action based on premises liability, the plaintiff must show that the defendant had both possession and control of the premises at the time of the injury. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980); *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002).

A "possessor" of land is:

"(a) a person who is in occupation of the land with intent to control it or

> "(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> "(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." [*Merritt, supra*, quoting 2 Restatement Torts, 2d, § 328 E, p 170.]

"Possession," in this context, is " 'the right under which one may exercise control over something to the exclusion of all others' " and "control" is "exercising restraint or direction over; dominate, regulate, or command," and "the power to . . . manage, direct, or oversee." *Derbabian*, *supra* at 703, quoting Black's Law Dictionary (7th ed) and *Random House Webster's College Dictionary* (1995), p 297.

In this Court, plaintiff argues that Vincenti Court retained control over the premises because it leased only part of the building and it was responsible for certain aspects of the repair and maintenance of the building. The drain was a known safety problem that Vincenti Court was planning on redesigning, but had not done so by the time plaintiff fell. The drain caused the water to collect, resulting in icy patches, and the drain was Vincenti Court's responsibility.

We disagree. The agreement between Vincenti Court and its tenant, plaintiff's employer, expressly gives the tenant sole possession of the part of the parking lot at issue, and expressly provides that the tenant is responsible for keeping that part of the lot safe and free of ice and snow. Plaintiff's employer was in the position to know that it had an employee on crutches who would be using the handicap spot, and it was plaintiff's employer who was responsible for clearing the ice. Even if Vincenti Court was responsible for the drain that routed water into the parking lot, that does not diminish the tenant's duty to keep the parking lot safe.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio